

U.S. Department of Labor

**Board of Alien Labor Certification Appeals
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Date Issued: 09/27/99

Case No.: 1999 INA 201

In the Matter of:

GOURMET PIZZA DELI, Employer,

on behalf of

CARLOS ALBERTO MARTINEZ, Alien.

Appearance: G. W. Sobral, Esq., of Falls Church, Virginia, for Employer and Alien.
Certifying Officer: R. E. Panati, Region III.

Before: Huddleston, Jarvis, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

ORDER OF REMAND

This case arose from a labor certification application that was filed on behalf of **CARLOS ALBERTO MARTINEZ** ("Alien") by **GOURMET PIZZA DELI** ("Employer") under § 212 (a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) ("the Act"), and regulations promulgated thereunder at 20 CFR Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor at Philadelphia, Pennsylvania, denied the application, and the Employer appealed pursuant to 20 CFR § 656.26.¹

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States to perform either skilled or unskilled labor may receive a visa, if the Secretary of Labor has decided and has certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the time of the application

¹The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

and at the place where the alien is to perform such labor; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed at that time and place. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. The requirements include the responsibility of an Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means to make a good faith test of U.S. worker availability.²

STATEMENT OF THE CASE

On July 23, 1997, the Employer applied for alien labor certification on behalf of the Alien for the position of Cook in its restaurant. AF 28, box 13. The duties of the Job to be Performed were the following:

To cook, prepare and season soups, meats, vegetables, desserts, and other food stuffs in the American Style Cuisine.

AF 15, box 13. (Copied verbatim without change or correction.) The position was classified as Baker, Pizza, under DOT No. 313.381-014.³ No "Other Special Requirements" were stated. No educational qualification was specified, but the Employer required two years of experience in the Job Offered.⁴ The hourly wage offered was \$11.47. The work week consisted of forty hours per week of regular time from 11:00 a.m., to 7:00 p.m., on days that were not specified, with overtime at one and a half times the regular wage rate. *Id.*, boxes 10-12, 14-15.

Notice of Findings. The Notice of Findings ("NOF") issued on December 17, 1998, denied certification, subject to the Employer's rebuttal. AF 15-17. Citing 20 CFR § 656.21(b)(2), the NOF found that the requirement of two years of experience was unduly restrictive.

²Administrative notice is taken of the Dictionary of Occupational Titles, ("DOT") published by the Employment and Training Administration of the U. S. Department of Labor.

³313.381-014 **BAKER, PIZZA** (hotel & rest.) Prepares and bakes pizza pies: Measures ingredients, such as flour, water, and yeast, using measuring cup, spoon, and scale. Dumps specified ingredients into pan or bowl of mixing machine preparatory to mixing. Starts machine and observes operation until ingredients are mixed to desired consistency. Stops machine and dumps dough into proof box to allow dough to rise. Kneads fermented dough. Cuts out and weighs amount of dough required to produce pizza pies of desired thickness. Shapes dough sections into balls or mounds and sprinkles each section with flour to prevent crust forming until used. Greases pan. Stretches or spreads dough mixture to size of pan. Places dough in pan and adds olive oil and tomato puree, tomato sauce, mozzarella cheese, meat, or other garnish on surface of dough, according to kind of pizza ordered. Sets thermostatic controls and inserts pizza into heated oven to bake for specified time. Removes product from oven and observes color to determine when pizza is done. *GOE: 05.10.08 STRENGTH: M GED: R3 M2 L1 SVP: 5 DLU: 77.*

⁴The Alien was born 1974. He was a national of El Salvador. At the time of application the Alien was living in the United States and working for the Employer in the job offered apparently without a visa or other lawful permission. The Alien worked from 1992 to 1995 as a Cook in a restaurant in Virginia, where he said his duties were the same as those listed for the Job Offered. AF 30-32.

The CO found that the menu of the Employer's restaurant described a need for a combination of Baker, Pizza, No. 313.381-014, with a Specific Vocational Preparation ("SVP") level of 5, consisting of six months to one year under the DOT criteria, and a Cook, Fast Food, No. 317.644-010,⁵ with an SVP of 2, consisting of a short demonstration up to and including one month.⁶ The NOF explained,

Your business establishment appears to be primarily a sandwich and pizza shop. The foods which are listed (pizza and sandwiches) do not require extensive training in cooking in order to prepare and cook. The preparation of these food items does not correspond with the job duties of a Cook (hotel & rest.) 313.361-014 which is a highly skilled occupation.

Restating the DOT description of the occupation of a Cook, the NOF explained that a cook in the Employer's restaurant does not prepare soups, salads, gravies, desserts, sauces, and casseroles, nor does this employee bake, roast, broil, and steam meats, fish and vegetables. Having compared the DOT occupation descriptions, the Employer's menu of food offerings which demanded limited preparation time and limited preparation skills, and the job duties stated in the Employer's Application, the NOF concluded that the Employer's requirement that job applicants have two years of experience exceeded the norm for the Job Offered and that its experience

⁵313.374-010 **COOK, FAST FOOD** (hotel & rest.) Prepares and cooks to order foods requiring short preparation time: Reads food order slip or receives verbal instructions as to food required by patron, and prepares and cooks food according to instructions. Prepares sandwiches [SANDWICH MAKER (hotel & rest.) 317.664-010]. Prepares salads and slices meats and cheese, using slicing machine, [PANTRY GOODS MAKER (hotel & rest.) 317.684-014]. Cleans work area and food preparation equipment. May prepare beverages [COFFEE MAKER (hotel & rest.) 317.684-010]. May serve meals to patrons over counter. *GOE: 05.10.08 STRENGTH: L GED: R3 M2 L2 SVP:5 DLU: 81.*

⁶In Appendix C the DOT defined the Specific Vocational Preparation as the amount of elapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation. "This training," Appendix C continued, "may be acquired in a school, work, military, institutional, or vocational environment. It does not include the orientation time required of a fully qualified worker to become accustomed to the special conditions of any new job. Specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs." The following are the various levels of specific vocational preparation that the DOT fixed at Appendix C: **Level Preparation**

- 1 Short demonstration only.
- 2 Anything beyond short demonstration up to and including 1 month.
- 3 Over 1 month up to and including 3 months.
- 4 Over 3 months up to and including 6 months.
- 5 Over 6 months up to and including 1 year.
- 6 Over 1 year up to and including 2 years.
- 7 Over 2 years up to and including 4 years.
- 8 Over 4 years up to and including 10 years.
- 9 Over 10 years.

requirement was unduly restrictive.⁷ The NOF instructed the Employer either to eliminate the unduly restrictive requirement or to demonstrate that this job requirement was based on business necessity. AF 16-17.

Rebuttal. The Employer's dated January 15, 1999, consisted of a letter by its owner, who explained the Employer's business necessity for the employment of the Alien. She said some of his duties included creating recipes for use in the restaurant's preparation of marinara sauces, chili, soups, chowders, bean dips, barbecue, salad dressings, sea food dishes, pastas, desserts, poultry dishes, and various side dishes. In his capacity as cook, she continued, the Alien supervised the kitchen staff's preparation of sandwiches and pizzas, and was responsible for sanitation and adherence to the applicable health code. The Employer also mentioned that the Alien's bilingual skill was helpful to the business. AF 14.

Final Determination. On January 29, 1999, the CO denied certification after considering the NOF, the Employer's rebuttal, and the entire record set out in the Appellate file. AF 11-12. The CO said,

Your argument for the Cook vs. Baker, Pizza is that preparing the food offerings on the menus also involves creating recipes for sauces, chili, soups, dips dressings, seafood dishes, pastas, desserts, poultry dishes, and various side dishes and requires the skill of a more experienced cook. You also indicated that the person incumbering the position is

⁷ 313.361-014 **COOK (hotel & rest.)** alternate titles: cook, restaurant prepares, seasons, and cooks soups, meats, vegetables, desserts, and other foodstuffs for consumption in eating establishments: Reads menu to estimate food requirements and orders food from supplier or procures food from storage. Adjusts thermostat controls to regulate temperature of ovens, broilers, grills, roasters, and steam kettles. Measures and mixes ingredients according to recipe, using variety of kitchen utensils and equipment, such as blenders, mixers, grinders, slicers, and tenderizers, to prepare soups, salads, gravies, desserts, sauces, and casseroles. Bakes, roasts, broils, and steams meats, fish, vegetables, and other foods. Adds seasoning to foods during mixing or cooking, according to personal judgment and experience. Observes and tests foods being cooked by tasting, smelling, and piercing with fork to determine that it is cooked. Carves meats, portions food on serving plates, adds gravies and sauces, and garnishes servings to fill orders. May supervise other cooks and kitchen employees. May wash, peel, cut, and shred vegetables and fruits to prepare them for use. May butcher chickens, fish, and shellfish. May cut, trim, and bone meat prior to cooking. May bake bread, rolls, cakes, and pastry [BAKER (hotel & rest.) 313.381-010]. May price items on menu. May be designated according to meal cooked or shift worked as Cook, Dinner (hotel & rest.); Cook, Morning (hotel & rest.); or according to food item prepared as Cook, Roast (hotel & rest.); or according to method of cooking as Cook, Broiler (hotel & rest.). May substitute for and relieve or assist other cooks during emergencies or rush periods and be designated Cook, Relief (hotel & rest.). May prepare and cook meals for institutionalized patients requiring special diets and be designated Food-Service Worker (hotel & rest.). May be designated: Cook, Dessert (hotel & rest.); Cook, Fry (hotel & rest.); Cook, Night (hotel & rest.); Cook, Sauce (hotel & rest.); Cook, Soup (hotel & rest.); Cook, Special Diet (hotel & rest.); Cook, Vegetable (hotel & rest.). May oversee work of patients assigned to kitchen for work therapy purposes when working in psychiatric hospital. GOE: 05.05.17 STRENGTH: M GED: R3 M3 L3 SVP: 7 DLU: 81 Prepares food and serves restaurant patrons at counters or tables: Takes order from customer and cooks foods requiring short preparation time, according to customer requirements. Completes order from steamtable and serves customer at table or counter. Accepts payment and makes change, or writes charge slip. Carves meats, makes sandwiches, and brews coffee. May clean food preparation equipment and work area. May clean counter or tables. GOE: 05.05.17 STRENGTH: M GED: R3 M3 L3 SVP: 7 DLU: 81

required to supervise the kitchen staff, and to insure adherence to sanitation and health codes. However, your menu clearly establishes that your business is primarily a pizza and sandwich shop. Although you indicate that the job also involves preparation of seafood dishes, pastas and various side dishes, such items are not reflected in your menu. Also, Form ETA 750, Part A, Item 17, reflects that no supervision of other employees is required, and insuring adherence to sanitation and health codes is not reflected as a job duty to be performed. There is no indication that the dinner selections change from week to week or from menu to menu as they would in a full-service restaurant. Further, the dinners listed on the menu, although they involve some degree of skill, remain the same and are prepared over and over again in the same basic manner. The great majority of your menu items, such as pizzas and sandwiches, are simply and quickly prepared. The preparation of these food items does not correspond with the job duties of a Cook .

The CO further explained the position of cook required two to four years of combined education, training and experience, and would involve the preparation of many types of sauces, the use of several dry and moist heat cooking methods, the preparation of a large variety of foods that were not offered in the Employer's menu. Concluding that such a cook works in a restaurant that offers on its regular menu the variety and complexity of dishes that was described in the DOT occupation description of the work of a Cook. The CO concluded that the application was correctly classified. As Employer's experience requirement exceeded the DOT norm, and as the Employer failed to delete the unduly restrictive requirement and did not persuasively establish its business necessity, certification was denied.

Appeal. On March 10, 1999, the Employer appealed to BALCA. New counsel appeared for the Employer. As grounds for review, the Employer said the two year experience requirement was not restrictive. The appeal argument by Employer's counsel elaborated on the variety of foods that it offers, and attached a copy of the menu. AF 07-10.

DISCUSSION

Issue. The Employer's appeal from the denial of certification is based on its assertion that the position was incorrectly classified as a Baker, Pizza, rather than as a Cook. The CO's distinction between the positions described was based on the circumstance that the Employer did not operate a full service restaurant..

Burden of proof. As the denial of alien labor certification was based on the CO's finding that the Employer failed to sustain this burden of proof, the Panel observes that labor certification is a privilege that the Act expressly confers by giving favored treatment to a limited class of alien workers, whose skills Congress seeks to bring to the U. S. labor market in order to satisfy a perceived demand for their services. 20 CFR §§ 656.1(a)(1) and (2), 656.3 ("Labor certification"). The scope and nature of the grant of this statutory privilege is indicated in 20 CFR § 656.2(b), which quoted and relied on § 291 of the Act (8 U.S.C. § 1361) to implement the

burden of proof that Congress placed on certification applicants:

"Whenever any person makes application for a visa or any other documentation required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act... ." ⁸

Employer's evidence. In the absence of evidence that the position was incorrectly classified by the state agency and by the CO, the Employer was required to prove the business necessity of its requirement that job applicants have two years of experience in the Job Offered and not one year.⁹ As the Appellate File did not contain evidence of business necessity, the issue in dispute is limited to a determination of whether the position was correctly classified. The Appellate File indicates that the Employer did not attach to its rebuttal either a copy of its menu or any other evidence supporting its contention that its restaurant offered the range of foods normally associated with a full service restaurant. Neither the Employer's request for review nor its supporting brief offered an explanation for the omission of such evidence from the rebuttal.

Summary and analysis. Because it was not transmitted with the Appellate File the menu proffered with Employer's appellate brief is new evidence. As the Board explained in **Gnaw Auto Sales & Parts**, 91 INA 352 (Dec. 16, 1992), BALCA can only review the record that was before the CO, and it cannot consider new evidence. Initially, this matter would be immediately resolved because Employer's new evidence cannot be considered in the Panel's review of the CO's denial of certification. **O'Malley Glass & Millwork Co.**, 88 INA 049 (Mar. 13, 1989).¹⁰ This cannot

⁸ The legislative history of the 1965 amendments to the Immigration and Nationality Act clearly shows that Congress intended that the burden of proof in an application for labor certification is on the employer who seeks an alien's entry for permanent employment. See S. Rep. No. 748, 89th Cong., 1st Sess., reprinted in 1965 U.S.D. Code Cong. & Ad. News 3333-3334. Moreover, since the Employer applied for alien labor certification under this exception to the far reaching limits of the Immigration and Nationality Act on immigration into the United States, which Congress adopted in the 1965 amendments, the Panel's deliberations concerning the award of alien labor certification are subject to the well-established common law principle that, "Statutes granting exemptions from their general operation must be strictly construed, and any doubt must be resolved against the one asserting the exemption." 73 Am Jur2d § 313, p. 464, citing **United States v. Allen**, 163 U. S. 499, 16 SCt 1071, 1073, 41 LEd 242 (1896).

⁹ The Board definitively explained how an employer can prove "business necessity" in **Information Industries, Inc.**, 88 INA 082 (Feb. 9, 1989). Under **Information Industries** an employer must show (1) that the unduly restrictive experience requirement bears a reasonable relationship to the occupation in the context of the employer's business, and (2) that the unduly restrictive experience requirement was essential to performing, in a reasonable manner, the job duties as described by the employer's application.

¹⁰ **Universal Energy Systems, Inc.**, 88 INA 005 (Jan. 4, 1989). See also **Capriccio's Restaurant**, 90 INA 480 (Jan 7, 1992); **Kelper International Corp.**, 90 INA 191 (May 20, 1991); **Kogan & Moore Architects, Inc.**, 90 INA 466 (May 10, 1991). For more recent cases see **Sidhu Assoc., Inc.**, 95 INA 182 (Jan. 2, 1997); **Roy Lipman Org., Inc.**, 95 INA 071 (Jul. 26, 1996); **Schroeder Brothers Co.**, 91 INA 324 (Aug. 26, 1992). For general discussion see **Construction**

resolve the issue raised in this appeal, however. Although no such evidence was transmitted with the Appellate File, the NOF and the Final Determination both relied heavily on the inferences that the CO drew from the contents of the Employer's menu. After receiving the Final Determination, the Employer apparently became aware that the record did not include a menu and, having neglected the opportunity to attach a copy to either its application or its rebuttal, belatedly attached a copy of the restaurant menu to its appellate brief in an attempt to remedy this omission.

As the menu was not before the CO when certification was denied, a question might arise as to whether the CO's Final Determination was supported by the record. 20 CFR §§ 656.26(b)(4) and 656.27(c).¹¹ On the other hand, because the Employer did not file the menu in support of either its Form ETA 750 A allegations or its rebuttal to the NOF, it might also be found that the record did not support the Employer's arguments that rely on the contents of its menu to sustain its burden of proof. **Richard and Teresa Hoover**, 94 INA 380 (Jul. 28, 1995). The Panel observes, however, that the menu was the subject of detailed discussions that led to the denial of certification, and that the CO expressly relied on the contents of the menu in the NOF and in the Final Determination. As the Panel did not find a menu supporting the CO's findings alluding to its contents and must initially determine whether the Appellate File correctly reflects the contents of the record, the Panel is unable to address this appeal without first considering whether a copy of the menu was filed and, if it was filed, whether the menu was omitted from the Appellate File by clerical error or inadvertence in the office of the CO at the time this record was transmitted to BALCA. 20 CFR § 656.27(c). Accordingly, the following order will issue.

ORDER

1. The Certifying Officer's denial of labor certification is vacated, subject to further proceedings following the remand of this file.
2. This application and the record transmitted by the Certifying Officer are hereby remanded for the Certifying Officer to determine whether or not the Employer filed a copy of its menu with its application, with its rebuttal, or at any time before the Final Determination was issued.
3. If a copy of the menu was not part of the record before the Certifying Officer at the time this Application was considered, the Certifying Officer is directed issue a new Notice of Finding that will allow the Employer to remedy the absence from the record of evidence of the

and Investment Corp., 8 INA 055 (Apr.24, 1989)(*en banc*).

¹¹ It is well established that a CO may deny a request for relief because it is based on new evidence that should have been presented as part of the employer's rebuttal to the NOF. **Royal Antique Rugs, Inc.**, 90 INA 529 (Oct. 30, 1991). Moreover, the CO was not required to accept the validity of the "new evidence" that Employer submitted subsequent to the filing of the rebuttal. **Harry Tancredi**, 88 INA 441 (Dec. 1, 1988)(*en banc*).

restaurant's menu and to issue a new Final Determination upon receiving its rebuttal to the second Notice of Finding.

4. If a copy of the menu was part of the record before the Certifying Officer at the time this Application was considered, however, the Certifying Officer is directed to complete the Appellate File and to return the corrected Appellate File for further consideration by BALCA.

For the panel:

FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

